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No. 279

In the Supreme Court of the United States

OCTOBER TERM, 1957

ELSA W. DE WAGENKNECHT AND N. V. EDMUND WAGENKNECHT'S HANDEL MAATSCHAPPIJ, PETITIONERS

v.

MRS. HUGO STINNES, SR., HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES AND ATLANTIC ASSETS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Federal Rules involved	2
Statement	2
Argument	5
Conclusion	7

CITATIONS

Cases:

Comstock v. *Group of Institutional Investors*, 335 U. S. 211 — 6

Continental Bank Co. v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648 — 6

Meccano, Ltd. v. *Wanamaker*, 253 U. S. 136 — 6

Southern Power Co. v. *North Carolina Pub. Serv. Co.*, 263 U. S. 508 — 6

Twachtman v. *Connelly*, 106 F. 2d 501 — 6

United States ex rel. Edelstein v. *Brussell Sewing Machine Co.*, 3 F. R. D. 87 — 6

United States v. *Johnston*, 268 U. S. 220 — 6

Walsh v. *Pullman Co.*, 10 F. R. D. 77 — 6

Statute and Rules:

Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*, Sec. 9 (a) — 2, 3

Federal Rules of Civil Procedure:

Rule 26 — 2

Rule 27 — 2, 6

Rule 30 — 2, 4, 6

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OPINIONS BELOW

The memorandum opinion and order of the District Court, filed February 23, 1956 (R. 136),[1] are unreported. The opinion of the Court of Appeals (R. 573) is reported at 243 F. 2d 413, and is set out in the appendix to the petition at p. 21.

JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 1957 (R. 583). The petition for a writ

[1] The order was modified on March 15, 1956, in respects not material here (R. 139).

of certiorari was filed on July 16, 1957. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether this Court should set aside as clearly erroneous the concurrent findings below that petitioners had a fair and ample opportunity to cross-examine respondent Stinnes and further cross-examination would be oppressive in the circumstances of this case.

2. Whether in the circumstances the termination of respondent Stinnes' deposition under Rule 30 (d), Federal Rules of Civil Procedure, was an abuse of discretion.

FEDERAL RULES INVOLVED

The pertinent provisions of Rules 26, 27, and 30, Federal Rules of Civil Procedure, are reprinted in the appendix to the petition at pp. 29–33.

STATEMENT

The proceedings were instituted in the District Court for the District of Columbia under Rule 27, F. R. C. P., by petition of respondent Stinnes, a citizen and resident of Germany, for an order authorizing perpetuation of her testimony by deposition on oral examination (R. 1). She claimed, as the widow and residuary legatee of Hugo Stinnes, Sr., to be the pre-vesting owner of all, or substantially all, of certain valuable property vested by the Attorney General under the Trading With the Enemy Act (40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*), against which property conflicting claims had been asserted by petitioners herein and by respondent Atlantic As-

sets Corporation (R. 1–2).[2] She conceded her own ineligibility under existing law to sue for the return of the vested property, but claimed that a bill was pending before the Congress under which, if enacted, she could and would bring suit to establish her claim of ownership against the Attorney General and the adverse claimants, all of whom were named as expected adverse parties in this proceeding (R. 2–5). Perpetuation of her testimony was sought on the issue of her ownership of the vested property because of her advanced age—then over 82—and frail health (R. 5).

The District Court on July 11, 1955, with the consent of all parties, authorized the taking of Mrs. Stinnes' deposition in Germany (R. 8–9). The first examination of Mrs. Stinnes began on August 30, 1955, and lasted for nineteen days. The sessions, because of her age and health, averaged two and a half hours per day (R. 84). The direct examination took three days and part of the fourth (R. 26). The Government's cross-examination began immediately after the direct, and was completed after one more daily session and part of another (R. 26). Cross-examination by petitioners' counsel occupied the remainder of the initial nineteen-day period—more than 13 days (R. 43).

Mrs. Stinnes' doctor, because of the adverse effect of the examination on her health, then had her enter a hospital for treatment (R. 45–46). At about the same time, she moved in the District Court under Rule

[2] There are now pending in the District Court for the District of Columbia four suits under § 9 (a) of the Trading With the Enemy Act by petitioners and others for the return of certain of the vested property (R. 76, 105).

30 (d), F. R. C. P., for an order terminating the examination forthwith or after such time as might appear reasonable to the court in the premises, upon the ground that the cross-examination by counsel for the petitioners was unreasonably oppressive (R. 14–15). The District Court on October 6, 1955, ordered, *inter alia*, that the deposition be resumed as soon as Mrs. Stinnes' health permitted, and that it be continued until completed or until found by her physician to be unduly prejudicial to her health (R. 48).

The deposition resumed in Mrs. Stinnes' hospital room where she was further cross-examined for two days by petitioners' counsel (R. 51, 84). On the second of these days, her doctor certified that because further questioning would endanger her life Mrs. Stinnes' examination should, at the maximum, continue for five additional days (R. 51, 71). Notwithstanding that in these circumstances the order of October 6, 1955, contemplated an equitable allocation among all attorneys of the time remaining for examination (R. 48), no such allocation was made and the remaining four days were used exclusively by petitioners' counsel in further cross-examination (R. 84). Mrs. Stinnes' physician then ordered the suspension of her testimony because of her health (R. 72, 84).

Upon Mrs. Stinnes' motion (R. 14–15), supported by the Government (R. 83–85), the District Court on February 23, 1956, entered an order directing that

[3] Part III of the petition (pp. 17–19) relates to some trivial errors made in that portion of the order of February 23, 1956, not involved here, which dealt with the payment of attorney fees. The order was resettled and modified on March 15, 1956 (R. 139–140), to correct these errors.

the deposition be terminated, holding, *inter alia* (Pet. App. 25, R. 137):

> * * * that the examining parties have had fair and ample opportunity to go into the matters in controversy despite difficult circumstances, and * * * that further cross-examination of petitioner would be oppressive * * *. If, as a consequence, the deposition is rendered incomplete, such fact may be called to the attention of the Court when it is offered in evidence, so that it may be evaluated properly.

The Court of Appeals affirmed, finding that there had been a clear showing of oppression and concluding (243 F. 2d at 418):

> Believing that there had been fair and ample opportunity to cross-examine the witness and to develop information relevant to the controversy, and considering the advanced age of the witness, the delicate state of her health and the probable adverse effect upon her health of further cross-examination, * * * it was clearly proper to terminate her cross-examination.

ARGUMENT

1. The questions presented are essentially fact questions. Petitioners do not dispute the correctness of the legal principles applied by the courts below, nor the propriety of the termination order on the basis of the facts as found. Their principal complaint is that the findings of "fair and ample opportunity" to cross-examine and of "oppression," findings concurred in by the court below, are erroneous. Manifestly, this fact question has no importance beyond the particular facts and parties involved, and accordingly

does not warrant review by this Court. See, *Southern Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U. S. 508, 509; *United States* v. *Johnston*, 268 U. S. 220, 227; *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214.

2. Termination of a deposition in accordance with Rule 30 (d), F. R. C. P.,[4] is in the sound discretion of the District Court (*United States ex rel. Edelstein* v. *Brussell Sewing Mach. Co.*, 3 F. R. D. 87 (S. D. N. Y.); *Walsh* v. *Pullman Co.*, 10 F. R. D. 77 (S. D. N. Y.)), the exercise of which will not be reversed except upon a showing of abuse of discretion. *Continental Bank Co.* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 678; *Meccano, Ltd.* v. *Wanamaker*, 253 U. S. 136, 141; *Twachtman* v. *Connelly*, 106 F. 2d 501, 507 (C. A. 6).[5]

The termination order was entered after Mrs. Stinnes had been examined for 25 daily sessions, and her doctor had certified her inability to undergo further examination. The direct examination lasted only three and a fraction of these days, and the Government's cross-examination two days. In contrast, cross-examination by petitioners' counsel, which cov-

[4] Petitioners' suggestion (Footnote to Pet., p. 6) that Rule 30 (d) does not apply to perpetuation proceedings under Rule 27 is contrary to the plain language of the last two sentences of Rule 27 (a) (3) (Pet. App. 31) which specifically provide that "these rules"—the Federal Rules of Civil Procedure—apply to such proceedings.

[5] Though lip service is paid in the petition to these axiomatic principles, implicit throughout is the notion that the parties, rather than the court, control the conduct of the examination, for the whole thrust of the argument seems to be that a termination order entered in the course of an examination necessarily deprives the examining party of a fair and ample opportunity to develop his case, and therefore is an abuse of discretion.

ered all matters in dispute, continued for the last nineteen and a fraction days, during the last four of which counsel was on notice of the terminal date of the examination. In light of these facts, and the advanced age and frail health of the witness, the termination order was well within the permissible area of discretion given to the District Court. Indeed, these basic facts more than warranted the findings of the courts below that petitioners had a fair and ample opportunity to cross-examine and that to continue the examination under the circumstances would have been oppressive.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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